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This Opinion is Not Citable as Precedent of the TTAB
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Nixon

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Serial No. 76388939

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Tucker & Latifi, LLP for Tracy Nixon.

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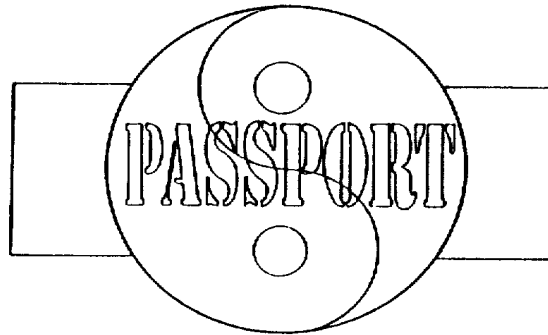
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Before Quinn, Bucher and Rogers,  
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Tracy Nixon, a citizen of the United States, has applied to register the mark PASSPORT TRAVEL SPA on the Principal Register for services identified as "operating beauty salons and rendering spa services," in Class 44. The application is based on applicant's stated bona fide intention to use the mark in commerce for the identified services, and includes a disclaimer of exclusive rights in the term "SPA."

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the existence of Registration No. 2232086, issued March 16, 1999, for the mark PASSPORT and design (shown below) for "therapeutic massage services," in Class 42.



When the refusal of registration was made final, applicant appealed and requested reconsideration. The examining attorney denied the request for reconsideration. Applicant and the examining attorney have filed briefs for the appeal, but applicant did not request an oral hearing.

The examining attorney has argued that the term PASSPORT is the dominant element in both the mark in the cited registration and in applicant's mark. As for the mark in the cited registration, the examining attorney argues that words tend to dominate over designs, because they can be used to call for the goods or services. The examining attorney also notes that the test is not whether

applicant's PASSPORT TRAVEL SPA mark and the registrant's PASSPORT and design mark could be distinguished if compared side-by-side, but whether consumers, who may retain only general impressions of marks they have seen, will be confused regarding the source or sponsorship of applicant's services. Specifically, the examining attorney contends that consumers could easily conclude that the PASSPORT TRAVEL SPA services are a new or approved offering from the source of PASSPORT therapeutic massage services.

In support of the contention that registrant's therapeutic massage services and applicant's beauty salon and spa services are related, the examining attorney has put into the record a number of third-party registrations showing the same mark used for beauty salon and/or spa services featuring massage services. For example, the mark AVANT GARDE (stylized) is registered for "beauty salons specializing in hair, massages, facials, manicures and pedicures; portrait photography"; the mark BLUE DOOR is registered for "...spa services providing body and skin treatments, namely massages, applications of lotions and compositions including skin lighteners, skin masks, antioxidant treatments, skin peels and salt scrubs"; the mark SPAHHS SKINCARE & BODYWORX is registered for "health spa services featuring massages, facials, manicures,

pedicures, and cosmetic consulting"; a stylized upper case letter R is registered to Robert's Hair Designer, Inc. for "beauty salon and spa services, namely, providing massages, facials, manicures, pedicures, hair care and nail care"; the mark MILAGRO is registered for "beauty salon and spa services, namely, providing massages, facials, manicures, pedicures, hair care and nail care"; and the mark DISCOVER THE BEAUTY is registered for "beauty salon and spa services featuring hair care, nail care, skin care, and massages."

Applicant has not argued that the services are unrelated, and we therefore view this point as having been conceded.<sup>1</sup> On the other hand, applicant has argued that the involved marks are dissimilar in sight, sound and meaning, that there are third-party registrations for various marks including the term PASSPORT that suggest that such marks can co-exist, and that consumers of the involved services are sophisticated. Brief, p. 2.

As to the third point, i.e., the asserted sophistication of the consumers for the involved services,

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<sup>1</sup> Moreover, we view relatedness to have been established by the third-party registrations made of record by the examining attorney. Third-party registrations which individually cover a number of different items and which are based on use in commerce (as are all but one of the registrations introduced by the examining attorney) serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

applicant has not presented any evidence or even arguments, only her conclusion. Thus, we do not find this very persuasive that the asserted sophistication of consumers will help avoid a likelihood of confusion.

As to the comparison of the involved marks, applicant notes that the marks look different because her mark includes two words not in registrant's mark and registrant's mark includes a design element; and that the marks sound different and have different meanings because of the two additional words in applicant's mark.

As to the existence of other registrations or applications for marks including the term PASSPORT, applicant essentially advances three arguments. First, applicant argues that PASSPORT has been registered for fragrances and concludes that if PASSPORT can be registered for fragrances notwithstanding a registration for PASSPORT for therapeutic massage (the cited registration), then PASSPORT TRAVEL SPA can be registered for applicant's services. Second, applicant argues that she has obtained approval of her application for PASSPORT NAILS and design without having the cited registration cited against that application. Third, applicant notes that registrations for PASSPORT HEALTH, PASSPORT TO HEALTH, and PASSPORT TO WELLNESS coexist for various health-related services.

We analyze the issue of likelihood of confusion using the factors that were articulated in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

"The likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record but 'may focus ... on dispositive factors.'" Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) (citations omitted).

In many cases, two key, although not exclusive, considerations are the similarities or differences between the marks and the similarities or differences of the goods and services. See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

The similarity or dissimilarity of the marks is assessed by comparing the marks as to appearance, sound, connotation and commercial impression. Herbko International Inc. v. Kappa Books Inc., 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002). It is well-settled

that marks, when compared, must be considered in their entireties and not simply to determine what points they have in common or in which they may differ. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983). Nonetheless, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Finally, it is not a necessary prerequisite for a finding of likelihood of confusion that marks be found similar in all respects, i.e., in sight, sound and meaning, and a likelihood of confusion may be found principally on similarity in one or two of these. See, e.g., In re Sarkli, Ltd., 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) ("The [USPTO] may reject an application ex parte solely because of similarity in meaning of the mark sought to be registered with a previously registered mark").

Considering the marks, we note that applicant seeks to register her PASSPORT TRAVEL SPA mark in typed form. When a mark is registered in typed form, the registration of the mark is not limited to any particular font and we must

consider all reasonable forms of display in which the mark may be presented when used. Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971). We find that the font used in registrant's presentation of its PASSPORT and design mark would be a reasonable form of display for the proposed PASSPORT TRAVEL SPA mark.

Accordingly, in our analysis of likelihood of confusion, we consider that the words in the marks may look very similar. Moreover, we note the reprint of a web page of applicant's, put into the record by the examining attorney, which shows that the term PASSPORT is set against a background square of one color, while the words TRAVEL SPA are set against an adjacent background square of a different color. Thus, in applicant's actual means of presentation of the applied-for mark, she has presented the mark in a way that highlights the term PASSPORT.<sup>2</sup>

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<sup>2</sup> In addition to the separation of the words TRAVEL SPA, the web page description of applicant's services states: "Our daily lives are filled with stressful situations that can take their toll on our bodies. For many, traveling only adds to the problem. Passport Travel Spa provides the relief you seek, with professional licensed massage therapists on-hand to literally rub your worries away." Given the visual separation of the words PASSPORT and TRAVEL SPA, and the language used by applicant to promote the massage services offered through her spa, prospective consumers are more likely to focus on PASSPORT as the source-indicating term in her mark and to consider TRAVEL SPA as suggestive or descriptive of spa or massage services of a particular type.



In terms of the connotation of the involved marks, we find them very similar. Specifically, both marks convey the connotation of travel. While the asserted "Yin and Yang" symbol in the registered mark may also suggest, for those familiar with the symbol, that registrant's massage services may be similar to Chinese forms of massage, this is a separate connotation from that of travel imparted by the word PASSPORT, i.e., the symbol does not alter the connotation of the word PASSPORT.

There is nothing in the record to suggest that PASSPORT is anything but an arbitrary term when used on or in connection with the involved services. Accordingly, we consider it a strong in terms of distinctiveness. Because of the dominance of PASSPORT in both marks and the similar connotations of travel imparted by each mark, we find the marks similar for likelihood of confusion purposes.

Given the relatedness of the services and the similarity of the marks, we find that confusion among prospective consumers of applicant's and registrant's services is likely. We are not persuaded otherwise by applicant's argument that prospective consumers of these services would be discriminating. When the involved marks are used in conjunction with the respective massage and spa

services,<sup>3</sup> even careful or discriminating consumers may be confused. Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Finally, we are not persuaded by applicant's arguments regarding third-party registrations or applications (or applicant's own receipt of a registration for PASSPORT NAILS and design), that the scope of protection that should be accorded registrant's PASSPORT and design mark should be so limited that applicant's mark should be approved for publication. As outlined earlier, applicant has advanced three theories for this argument. We consider each in turn, below.

Applicant's first argument for restricting the scope of protection that should be accorded the cited registration is based on applicant's contentions that there exists a registration for PASSPORT for fragrances and that there are "numerous renowned cosmetic lines, such as ESTEE LAUDER and ELIZABETH ARDEN, which also operate beauty salons or spas under the same trademark as used for their cosmetic line." Request for reconsideration, p. 3. By its own terms, the second contention supporting this argument is only that the same marks are used for cosmetics and

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<sup>3</sup> The record establishes that applicant's spa services include the offering of massage services.

beauty salons or spas, not that the same marks are used for fragrances and salons or spas offering massage services. For this reason alone, applicant's argument is infirm. More importantly, when considering the ESTEE LAUDER and ELIZABETH ARDEN registrations on which applicant relies, we see that they do not, in fact, support applicant's position. First, none of the ESTEE LAUDER registrations submitted by applicant covers spa services or massage services. Second, the registrations show the same ELIZABETH ARDEN mark registered for massage services and what may be characterized as spa services, on the one hand, and for eyeglass frames on the other, but show a different mark used for cosmetics and fragrances.

Applicant's second argument for restricting the scope of protection that should be accorded the cited registration is based on applicant's contention that she has obtained a registration for PASSPORT NAILS and design for services identified as operating cosmetics and beauty salons. We note, however, that applicant's registration for the PASSPORT NAILS and design mark is just that, a registration that includes a design entirely different from the design in the PASSPORT and design mark registration cited against the application involved in this appeal. In short, the likelihood of confusion analysis brought to bear

on applicant's other application cannot be compared to the likelihood of confusion analysis required by this appeal.

Applicant's third argument for restricting the scope of protection that should be accorded the cited registration is based on applicant's contention that the following marks coexist on the register: PASSPORT HEALTH for health care services for travelers (Registration No. 2058410), PASSPORT TO HEALTH for educational programs on physical and mental health issues (Registration No. 1805566), and PASSPORT TO WELLNESS for a preventive health care program (application Serial No. 76347115). In fact, the application to register PASSPORT TO WELLNESS is now abandoned. As to the two registrations that co-exist, we note that one is for health care services and the other for educational services relating to health-care issues. There is nothing in the record to establish whether these services are routinely provided under the same mark. Even if there were such information in the record, we would find the co-existence of these registrations of little probative value in deciding the question before us on this appeal. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

In short, each of the arguments advanced by applicant as to why we should accord the cited registration a limited

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scope of protection have little merit or probative value. They do not alter our conclusion that confusion is likely because of the similarity of the involved marks and the relatedness of the services.

Decision: The refusal of registration under Section 2(d) is affirmed.